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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DAMON DEL CAMBRE, Defendant and Appellant.	B168754 (Los Angeles County Super. Ct. No. BA 227612)
In re DAMON DEL CAMBRE, on Habeas Corpus.	B171836

APPEAL from a judgment of the Superior Court of Los Angeles County. William R. Pounders, Judge; ORIGINAL PROCEEDING, Petition for Habeas Corpus. Judgment affirmed as modified; Petition denied.

Peter Gold, under appointment by the Court of Appeal for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels and Alan D. Tate, Deputy Attorneys General, for Plaintiff and Respondent.

Damon Del Cambre (defendant) appeals a jury verdict on retrial convicting him of one count of first degree murder (Pen. Code, § 187, subd. (a)) and one count of second degree robbery (Pen. Code, § 211). The jury found true a special circumstance allegation that the murder was committed during the commission of the robbery (Pen. Code, § 190.2, subd. (a)(17)). The trial court found true the allegation that defendant had suffered two prior serious felony convictions (Pen. Code,[1] § 667, subds. (a) & (b)-(i), 1170.12, subd. (a)-(d)). The trial court sentenced defendant to life without parole on count one, plus a consecutive 25 years to life on count two.

Defendant contends that (1) the trial court improperly limited his eyewitness expert's testimony; (2) the trial court improperly permitted the introduction of hearsay statements in violation of the confrontation clause; (3) insufficient evidence supports the robbery-murder special circumstance finding; and (4) the trial court violated his Sixth and Fourteenth Amendment rights when it admonished the jury to inform the court if a juror refused to deliberate. Respondent contends on appeal that defendant is not entitled to any custody credits. Defendant's concurrently filed habeas petition alleges that he was provided ineffective assistance of counsel because his counsel failed to move to exclude prejudicial evidence of a witness's guilty plea. Reversing the award of custody credits, we otherwise affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Introduction.

Defendant was initially charged in a four-count indictment with one count of murder (§ 187), one count of second degree robbery (§ 211), one count of second-degree commercial burglary (§ 459), and one count of false imprisonment by violence (§ 236.) The information also alleged the special circumstance of robbery-murder (§ 190.2, subd. (a)(17)) and that a

[1] All statutory references herein, unless otherwise noted, are to the Penal Code.

principal was armed with a firearm with respect to counts two, three and four (§ 12022, subd. (a)(1)). At the conclusion of the first jury trial, the court dismissed, on the People's motion, counts three and four and the firearm allegations. After the jury deadlocked, the court declared a mistrial. The instant appeal concerns defendant's retrial on counts one and two.

Prosecution Case.[2]

May 5, 1994 Hanmi Bank Robbery.

On May 5, 1994, Phillip Whang worked as a loan officer at Hanmi Bank on South Western Avenue in Los Angeles. At approximately 11:00 a.m., he observed two young black males, about 14 to 16 years old walking down the street outside the bank, wearing hooded sweatshirts. About a minute later, he saw that they had entered the bank through a door that faces the bank's parking lot. They moved towards the bank's security guard, Eddy Sanchez, who was by the door. They exchanged words with Sanchez, and one of the young men grabbed at Sanchez's gun while the other grabbed his arm. Whang pushed the alarm button and ducked under his desk. Hearing a shot, he came out from behind his desk, saw Sanchez lying on the floor behind the receptionist's desk, and called 911. By that time the two teenagers were gone. At trial, Whang denied seeing defendant in the bank. Sanchez died as a result of his wounds.

Soojung Lim was a teller at the Hanmi Bank. She heard a commotion, what she thought was a gunshot, and suddenly a man, whom she identified as defendant, was standing in front of her. Defendant put a folded note on the counter top written in red ink. Defendant placed a white plastic bag next to the note and told her to put money into it. Lim complied. Lim looked at defendant several times while she was getting the money out, about eight to 10 seconds. Defendant was looking her in the eyes. Lim was intentionally looking at him so she would be able to identify him later. As soon as she was done putting the money (about $20,000) in the bag, defendant grabbed it out of her hand and ran. She noticed that he had a short ponytail.

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[2] The facts recited herein are from the testimony at defendant's second trial.

Lim was shown a six-pack photo array in early 2001. She identified two suspects in the photograph, one of which was defendant. In early 2002, she attended a live line-up. She identified defendant at the lineup, but told the police she was unsure of her identification. At the lineup, defendant no longer had his ponytail. After the lineup, Lim was shown some surveillance photographs from the bank.

On June 16, 1994, at about 4:00 p.m., Paula Chavez of the Los Angeles Police Department, with her partner Lance Jurado, was patrolling the area of 35th Street and Denker Avenue. They observed two cars run a stop sign, and followed the second car, which had three male Black occupants. After they pulled the car over, the three occupants got out of the car; the driver ran away. The driver of the car was Delvon Bridges; the passenger was Leo Carter. The officers found a firearm in the vehicle that turned out to be the weapon that killed Eddy Sanchez.

Nery Orellana was a security guard at the Hanmi Bank and Sanchez's brother-in-law. On the day before the robbery, he saw defendant in the parking lot. Defendant went over by a U-Haul storage area for about three to five minutes, then came back and got in his car. He told Orellana the storage was too expensive. Orellana got a good look at defendant, who was about six feet away. Defendant had a ponytail. Orellana identified defendant from a six-pack and at a live line-up.

Officer Joseph O'Donnell of the robbery-homicide division was the lead investigator in the case. He was assigned to the case in 1999, after the previous investigation had "gone cold." In November 2000, Detective Cassidy of the Pasadena Police Department contacted him in connection with a bank robbery that had taken place in Pasadena, and offered to give Officer O'Donnell the photographs of the two individuals arrested. Detective O'Donnell found that defendant, one of the individuals arrested in connection with the Pasadena bank robberies, "had a strong similarity" to one of the individuals in the surveillance photographs from the 1994 Hanmi Bank robbery. As a result of this identification, Detective O'Donnell showed a six-pack photo array containing defendant's photograph to Lim and Orellana. Orellana was certain of his identification of defendant.

October 10, 2000 Bank of America Robbery.

On October 10, 2000, Christian Herrera was a teller at the Bank of America near the intersection of California Avenue and Pasadena Avenue in Pasadena. The doors blew wide open and three armed men wearing ski masks came in, yelling "everyone down." One of the men jumped over the counter to the right of Herrera, opened Herrera's cash drawer, and started taking cash out. A second man came up to Herrera, pointed a gun at him, and asked for the manager. When Herrera responded that the manager was not in, the man held the gun up to his head. While this was occurring, the third man was patrolling the floor, telling customers "everyone be quiet, everyone on the floor." A bank employee unwittingly exited from the ATM machine service area, causing the door to sound an alarm. The robbers panicked and fled the bank. After they left, Herrera heard a screeching of tires, and saw a light-colored four-door late 1980s Oldsmobile. As part of his bank training, Herrera tried to get a good look at the robbers. He believed they were from 18 to 25 years of age, but because of the ski masks, he was unable to identify them.

On October 10, 2000, at about 10:15 a.m., Officer John Watkins of the Pasadena Police was on patrol on his motorcycle when he received a radio call concerning the robbery that had just taken place at the Bank of America. He was advised that three Black male suspects were in a white Oldsmobile Cutlass Sierra. About two minutes later, Officer Watkins observed the vehicle getting on the freeway, about one-quarter to one-half mile away from the bank. The vehicle had two occupants. Officer Watkins pursued the vehicle; when the car stopped, the occupants were taken into custody without incident.

Detective Richard Cassidy of the Pasadena Police Department participated in the search of the car, which belonged to defendant. The officers found a nine-millimeter bullet, but no guns, ski masks, or weapons. At a field show-up, no one from the Bank identified defendant as being one of the robbers in the bank. Shortly after the robbery, an abandoned grey Cutlass Sierra was found in an alley near the Bank.

Detective Cassidy and Detective Finney interviewed Thomas Owens, the passenger in the car with defendant, the day of the robbery and the following day; the interview was taped.

Although he initially denied any involvement in the bank robbery, Owens admitted that he was part of a getaway plan. The robbers intended that two similar cars be used. They planned for the lighter colored car (defendant's car) to follow the getaway car so the police would read defendant's license plates instead of the robbers' plates. A third car, an S.U.V., was also used. The robbers parked the S.U.V. in an alley and got into the grey car. When they got to the bank, they ran into the bank, and came out running, jumped into the car and drove off. The robbers wore gloves and masks. Later, Owens stated that the robbers had removed their masks and run back into the alley, where they abandoned the grey car and jumped into the S.U.V. After the robbery, Owens and defendant were to follow the getaway car, but they got scared and left. Finally, Owens told Detective Cassidy that they drove out of the Von's parking lot and into the alley. They saw the three masked robbers run down the alley; at that point, Owens and defendant made a U-turn and headed towards the freeway.

Owens did not know the real names of the robbers; he knew them by their gang names (Kick Ass, Joe Boy, and Stime or Baby Stime). They had met them several days before in Inglewood. The robbers offered them money to help with the robbery. Owens told the police where they could find the robbers.

Owens pleaded guilty as an aider and abetter in the Bank of America robbery. At defendant's trial, Owens initially refused to testify. The trial court admonished him that he was scheduled to be released from state prison within eight days, and warned that a letter would be sent to the Board of Prison terms concerning his lack of cooperation. After recess and consultation with his attorney, Owens took the stand but answered each question with "I don't recall." He did not recall, among other things, the date he was scheduled to be released from prison, whether he was arrested on October 10, 2000, or whether he told the police he acted as a lookout for the robbery. Defense counsel did not cross-examine Owens.

Defense Case.

Dr. Shomer, an eyewitness identification expert, testified to a number of factors affecting the accuracy of memory.

First, he explained that the passage of time caused memory to deteriorate. After 24 hours there is a rapid drop off in accuracy, and then a slower drop as more time passes. However, an observation that happened under dramatic or frightening circumstances might remain very vivid, leading the person to believe it was still accurate even after the passage of time.

Second, he discussed the ability to accurately identify a stranger. The amount of time a person is viewed affects accuracy, but a witness's estimate of time spent viewing a suspect is not accurate in stressful situations. Dr. Shomer testified that a short time spent observing the face of a stranger is the most difficult circumstance upon which to base an accurate identification. When a person is in a dangerous situation with a weapon present, he or she tends to focus on the weapon, making an accurate identification of the person less likely. It is easier to identify someone from one's own racial group.

Third, he testified to the impact of various identification procedures. When a photographic array is used, problems arise because the array is two-dimensional and people tend to resemble each other more than they do in real life. More accuracy is obtained in a live lineup, where the whole body is seen and the person is in three dimensions. Often persons making an identification try to determine whether the person being viewed looks like the person they remember, which is called "relative judgment." This can lead to identification error. In-court identifications occur at the end of a long process, after the individual has committed himself or herself to a choice of someone as the perpetrator. With every repetition of the identification procedure, the confidence level of the witness goes up. Dozens of studies have shown that there is no correlation between confidence and accuracy. Once a person has committed to an identification, he or she tends to dismiss inconsistencies. In assembling a photo array, there are two criteria for a good array: no one person should stick out, and the persons should match the initial descriptions. The distance at which a person is observed affects the accuracy of identification.

DISCUSSION

I. THE TRIAL COURT DID NOT IMPROPERLY LIMIT DEFENDANT'S EYEWITNESS EXPERT'S TESTIMONY.

A. Factual Background.

Prior to the introduction of Dr. Robert Shomer's expert testimony on eyewitness identification, the court held an Evidence Code section 402 hearing to address the scope of permissible testimony. At the first trial, the court had prohibited Shomer from offering an opinion about whether a particular witness was accurate in making his or her identification, and from rendering any statistical analysis concerning probabilities of misidentification. At the second trial, the court permitted Dr. Shomer to testify about various factors bearing on identification, whether any particular factor existed in this case, and how it would affect the ability of the witness to make an identification. The court allowed Dr. Shomer to "comment on the circumstances, [but] not on the particular witness'[s] ability to make the identification." Thus, the court refused to permit a question such as "'Doctor, assume that the witness sees a stranger of another race only briefly in the course of a sudden frightening bank robbery.'" The trial court also prohibited Dr. Shomer from lumping all the factors into one hypothetical based upon the facts of the instant case, or from presenting statistics on the percentages of misidentifications. However, the court ruled that Dr. Shomer could opine about the general factors affecting eyewitness testimony.

B. Although the Evidence was Improperly Excluded, The Error was Harmless.

Defendant contends these limitations on Dr. Shomer's ability to use hypothetical questions tailored to the facts of this case infringed on defendant's right to a fair trial and the error was prejudicial because Dr. Shomer's opinion was crucial to the defense. He contends that hypothetical questions may properly be framed on theories that may be deduced from the evidence, and the questioner may assume facts within the limits of the evidence and omit other facts not material. (See, e.g., *People v. Sims* (1993) 5 Cal.4th 405, 436; CALJIC No. 2.82.) Indeed, he contends, the Supreme Court in *People v. McDonald* (1984) 37 Cal.3d 351, 370-371, overruled on other grounds by *People v. Mendoza* (2000) 23 Cal.4th 896, expressly

held that an eyewitness expert could relate his testimony to the specific facts of the case, and that such questioning would not usurp the jury's credibility assessments.

Although experts may testify to ultimate facts, they may not testify to a witness's credibility. (See *People v. Ainsworth* (1988) 45 Cal.3d 984, 1012 [psychiatrist may not testify whether witness was telling the truth].) In *McDonald,* the Supreme Court found the trial court's exclusion of expert eyewitness identification was error. The ruling was based upon the court's conclusion that psychological and cognitive factors bearing on eyewitness identification were beyond the common experience of jurors, such that expert testimony would assist the trier of fact. (*People v. McDonald, supra,* 37 Cal.3d at p. 369.) *McDonald* found that such expert eyewitness testimony would not address the capacity of the particular witness to perceive or recall the person to be identified; instead, such testimony would "inform the jury of certain psychological factors that may impair the accuracy of a typical eyewitness identification. . . ." (*Id.* at p. 366.) Such testimony would not usurp the jury's function, and *McDonald* further noted that "California has abandoned the 'ultimate issue' rule in any event: 'in this state we have followed the modern tendency and have refused to hold that expert opinion is inadmissible merely because it coincides with an ultimate issue of fact.' [Citation]" (*Id.* at p. 371.)

Although *McDonald* did not expressly address the type of summary hypothetical barred here, it does permit the use of expert testimony to reach ultimate issues, and it supports the line of questioning that took place at the first trial but was excluded at the second trial. Dr. Shomer never testified that "the witnesses would have been unable to identify the defendant under the specified conditions." Rather, he enumerated the relevant factors that would affect the eyewitness identification and explained how the specific factors would affect perception and memory.

Nonetheless, this does not create reversible error. Dr. Shomer's testimony, even in the absence of detailed hypotheticals, was extensive on these critical factors. Thus, it is not reasonably probable that the result would have been different but for the exclusion of the

evidence.[3] (*People* v. *Watson* (1956) 46 Cal.2d 818, 836.) Our conclusion is not changed by the fact the first trial resulted in a mistrial, as we cannot conclusively determine that the identifications were the cause of the mistrial.

II. THE INTRODUCTION OF OWENS'S HEARSAY STATEMENTS WAS PROPER.

Defendant contends the court erred in admitting the hearsay statements of Owens as prior inconsistent statements. He contends the statements were not prior inconsistent statements under Evidence Code section 1235, and even if they had been, introduction of the evidence violated the confrontation clause because Owens's testimony on the stand did not constitute the required "confrontation." (*Crawford v. Washington* (2004) __ U.S. __, 124 S.Ct. 1354 (*Crawford*).)

A. Owens's Statements Were Prior Inconsistent Statements Because the Court Was Justified in Concluding He Was Being Deliberately Evasive.

Defendant contends that Owens's statements to the police do not qualify as prior inconsistent statements because where a witness recalls no facts or refuses to answer any questions, the witness's earlier statement is not a "prior inconsistent statement." (See, e.g., *People v. Levesque* (1995) 35 Cal.App.4th 530, 544-545; see also *People v. Newton* (1970) 8 Cal.App.3d 359, 385; *People v. Rios* (1985) 163 Cal.App.3d 852, 864; *People v Shipe* (1975) 49 Cal.App.3d 343, 354.) The rule is not that simple.

A prior statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement. "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770."[4]

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[3] Defendant argues that the higher *Chapman* (*Chapman v. California* (1967) 386 U.S. 18) standard applies to require reversal unless the error is harmless beyond a reasonable doubt. We do not agree. Evidentiary rulings are evaluated under the *Watson* standard. (*People v. Sanders* (1995) 11 Cal.4th 475, 510.)

[4] "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an

(Evid. Code, § 1235.) The "fundamental requirement" of Evidence Code section 1235 is that the statement in fact be *inconsistent* with the witness's trial testimony. (*People v. Sam* (1969) 71 Cal.2d 194, 210.) Where a witness refuses to testify, prior inconsistency is implied where the court finds the witness falsely claims failure to remember to deliberately avoid testifying. (*People v. Green* (1971) 3 Cal.3d 981, 989.) However, the prior statement is not admissible where the record shows no reasonable basis for concluding the witness's responses are evasive or untruthful. (*People v. O'Quinn* (1980) 109 Cal.App.3d 219, 225.)

Defendant relies on *People v. Rios* (1985) 163 Cal.App.3d 852, in which the court found that there "is no relevant legal difference between the situation where the stonewalling witness refuses to answer any questions and the situation where the witness totally recalls no facts, for purposes of determining inconsistency under Evidence Code section 1235." (*Id.* at p. 864.) Because Evidence Code section 1235 by its terms required a witness to give testimony from which an inconsistency could be determined, *Rios* found where the witness refuses to testify on the stand or does not remember, there is neither a "statement" in the record that could be inconsistent nor express testimony from which to infer implied inconsistency. (*Id.* at p. 864.)

In acknowledging the general rule that the testimony of a witness who does "not remember" is not inconsistent with prior statements, the Supreme Court in *People v. Johnson* (1992) 3 Cal.4th 1183, reaffirmed that courts do not apply the rule mechanically. *Johnson* relied on *People v. Green, supra,* which found that "'[i]nconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness's prior statement [citation], and the same principle governs the case of the forgetful witness.' [Citation.] When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation] As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior

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opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action."

statements is proper. (*People v. O'Quinn* (1980) 109 Cal.App.3d 219, 225, 167 Cal.Rptr. 141.)" (*People v. Johnson, supra,* 3 Cal.4th at pp. 1219-1220; see also *People v. Perez* (2000) 82 Cal.App.4th 760, 763-764.)

Here, the record contains a reasonable basis for concluding that Owens's answers were evasive and untruthful. Owens was arrested with defendant the day of the robbery, yet he stated that he could not recall this, or any other fact, when questioned at trial. He was even unable to recall that he was scheduled for release in eight days. Given his denial of recall of these obvious facts, the trial court could reasonably conclude his other responses were evasive and untruthful and therefore inconsistent. Therefore, his taped interviews were properly admitted as prior inconsistent statements.[5]

B. The Introduction of Owens's Extra-Judicial Statement Did Not Violate The Confrontation Clause Because Owens Took The Stand And Was Available For Cross-Examination.

However, we must consider whether Owens's presence on the stand gave defendant the constitutionally required "confrontation." The Sixth Amendment right to confrontation (the confrontation clause) provides that a defendant in a criminal case has a right "'to be confronted with the witnesses against the him.'" (*California v. Green* (1970) 399 U.S. 149, 155.) The purpose of confrontation is to ensure reliability by means of the oath, to expose the witness to cross-examination, and to permit the trier of fact to assess credibility. (*Id.* at p. 158.)

1. Crawford Held that Extra-Judicial Testimonial Statements Must Be Subject to Cross-Examination.

In *Crawford v. Washington, supra,* 124 S.Ct. 1354, the court rejected the rule of *Ohio v. Roberts* (1980) 448 U.S. 56 that an unavailable witness's out-of-court statement may be admitted as long as it had adequate indicia of reliability because it either fell within a "firmly rooted hearsay exception" or bore "particularized indicia of trustworthiness." (*Id.* at p. 1359.)

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[5] *People v. Levesque, supra,* 35 Cal.App.4th 530, upon which defendant relies, is distinguishable on the basis that the trial court found the witness was not being evasive. (*Id.* at p. 544.)

Crawford replaced the *Ohio v. Roberts* rule with a new focus on the "testimonial or nontestimonial nature" of the out-of-court statement. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Crawford, supra*, 124 S.Ct. at p. 1374.)

In *Crawford*, the defendant went with his wife to the victim's home, where defendant stabbed the victim. (*Crawford, supra,* 124 S.Ct. at p. 1357.) Defendant's wife made a statement to the police that did not entirely corroborate the defendant's account of self-defense. She did not testify at trial because of the marital privilege. (*Ibid.*) *Crawford* held admission of her statement to the police at defendant's trial violated the confrontation clause because defendant had no prior opportunity to cross-examine her. (*Id.* at p. 1374.)

In reaching its conclusion, *Crawford* discerned two essential features of the confrontation clause: (1) the principal evil sought to be avoided was the use of *ex parte* examinations as evidence against the accused; and (2) the Framers of the Constitution would not have permitted admission of testimonial statements of a witness who did not appear at trial unless he was unable to testify, and the defendant had had a prior opportunity to cross-examine him. (*Id.* at pp. 1363, 1365.) Thus, *Crawford* concluded that "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." (*Id.* at p. 1369.)

Crawford rejected *Ohio v. Roberts* because its tests of a "firmly rooted hearsay exception" and "particularized guarantees of trustworthiness" departed from these historical principles. These tests were both too broad, applying the same mode of analysis whether or not the hearsay consisted of *ex parte* testimony, and too narrow, admitting statements that did consist of *ex parte* testimony upon a mere finding of reliability. (*Crawford, supra,* at p. 1369.) *Crawford* concluded, "[t]his malleable standard often fails to protect against paradigmatic confrontation violations." (*Ibid.*) Therefore, *Crawford* found that "where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous

notions of 'reliability.'" Indeed, "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." (*Id.* at p. 1370.) Therefore, although the Confrontation Clause was meant to insure reliability, "[i]t commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." (*Ibid.*)

In conclusion, the Supreme Court held that "[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: "unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." (*Crawford, supra,* at p. 1374.)

2. Because Owens Took the Stand and Was Subject to Cross-Examination, Defendant Was Afforded Sufficient Confrontation to Comport with Sixth Amendment Principles as Set Forth in Crawford.

What constitutes effective confrontation was addressed in *United States v. Owens* (1988) 484 U.S. 554 (*Owens*). *Owens* found the confrontation clause only guaranteed an opportunity for effective cross-examination, not a cross-examination that was effective from the defendant's standpoint. "The weapons available to impugn the witness'[s] statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee." (*Owens, supra,* at p. 560.) When the witness takes the stand at trial, and is subject to cross-examination, "the traditional protections of the oath, cross-examination and opportunity for the jury to observe the witness'[s] demeanor satisfy the constitutional requirements." (*Ibid.*) Indeed, citing *California v. Green, supra,* 399 U.S. 149, *Crawford* reiterated this principle: "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." (*Crawford v. Washington, supra,* 124 S.Ct. at p. 1369, fn.9.)

In *Perez,* the court addressed the issue of cross-examination sufficient to fulfill confrontation clause principles. In *Perez,* the witness, who had observed a murder, took the stand but responded "I don't recall" or "I don't remember" to virtually all questions. Her prior statements to police were admitted under Evidence Code section 1235. (*People v. Perez, supra,* 82 Cal.App.4th at p. 763.) After concluding the statements were inconsistent under *O'Quinn* and related authorities, *Perez* found no Confrontation Clause violation because "[t]he witness [] was not absent from the trial. She testified at length at trial and was subjected to lengthy cross-examination. The jury had the opportunity to observe her demeanor, and the defense cross-examined her about bias. Even though she professed total inability to recall the crime or her statements to police, and this narrowed the practical scope of cross-examination, her presence at trial as a testifying witness gave the jury the opportunity to assess her demeanor and whether any credibility should be given to her testimony or her prior statements. This was all the constitutional right to confrontation required." (*Id.* at p. 766.)

Applying these principles to the instant case, the fact that defense counsel apparently assumed that Owens would continue to respond "I don't recall" in any attempts at cross-examination does not render the introduction of Owens's hearsay statements made at his interview constitutionally invalid. The legal principles only require that Owens be *subject* to cross-examination, not that he actually answer questions put to him or that he answer in a manner satisfactory to the defendant. Even if counsel had chosen to examine him, and Owens had responded in the same manner as he had on direct examination, this would not negate the fact he was under oath. The jury would have had the opportunity to observe his demeanor to evaluate for itself the veracity of his statement that he "did not recall." On the contrary, Owens' presence at trial on the stand afforded defendant the traditional protections of oath, cross-examination and the opportunity for the jury to observe the witness's demeanor sufficient to satisfy the constitutional requirements.

III. THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Defendant contends the robbery-murder special circumstance for the Hanmi Bank robbery is not supported by substantial evidence in this case because the evidence does not show that he subjectively appreciated that his acts were likely to result in the taking of innocent life. (See *Tison v. Arizona* (1987) 481 U.S. 137, 152 (*Tison*).) He argues there was no evidence of a plan to kill, he did not personally shoot or assault anyone, and that the evidence neither suggests that he was aware anyone would be shot, nor demonstrates that he and the other robbers entered the bank with any weapons. We disagree.

Penal Code section 190.2, subdivision (a)(17) provides that a murder is a special circumstance murder where "[t]he murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies: [¶] (A) Robbery in violation of Section 211 or 212.5."

After the adoption of Proposition 115 in 1990, California courts adopted the standard of *Tison, supra,* 481 U.S. 137, which requires a finding in a special circumstances case that a defendant aided and abetted the criminal enterprise as a major participant and with reckless indifference to human life. (Pen. Code, § 190.2, subd. (d); *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298, fn.16; *People v. Estrada* (1995) 11 Cal.4th 568, 575-576 (*Estrada*).) Therefore, subdivision (d) of section 190.2, defining "reckless indifference,"[6] was added by Proposition 115 to bring the death penalty into conformity with that holding.

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[6] Section 190.2, subdivision (d) provides that: ". . . every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4."

Tison addressed the problem of whether imposition of the death penalty on an accomplice to a felony murder who neither killed nor intended to kill the victim would violate the Eighth and Fourteenth Amendments. (*Tison, supra,* at p. 152; *Estrada, supra,* 11 Cal.4th at p. 575.) *Tison* held that the death penalty may be imposed in a case of major participation in the felony committed, combined with reckless indifference to human life. "[T]he reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result." (*Tison, supra,* 481 U.S. at pp. 157-158.) Our Supreme Court has held that the term "reckless indifference to human life," means "subjective awareness of the grave risk to human life created by [the defendant's] participation in the underlying felony." (*Estrada, supra,* 11 Cal.4th at p. 578.) Several recent California cases are illustrative of these principles.

In *People v. Proby* (1998) 60 Cal.App.4th 922, the defendant participated in a McDonald's robbery in which his accomplice shot and killed a McDonald's employee. Defendant had previously participated in a robbery with the same accomplice where the accomplice used, but did not fire, a gun, and the employees were herded into a freezer. (*Id.* at p. 925-926.) Defendant admitted to police that he had provided the defendant with the gun used in the robbery; he heard a "pop" and saw his accomplice leaning on the victim; and he saw a "pus ball" coming from the back of the victim's head. Defendant and his accomplice left the McDonald's with money from the safe. (*Id.* at p. 926.) *Proby* found the defendant was a "major participant" who acted with "reckless indifference." The defendant showed little concern for the victim and did nothing to determine whether he could assist the victim, had previously participated in a robbery with his armed accomplice, and left the McDonald's with money from the safe. (*Id.* at p. 929.)

In *People v. Mora* (1995) 39 Cal.App.4th 607, defendant went with an accomplice according to a prearranged plan to an acquaintance's home to purchase drugs. (*Id.* at p. 611.) After defendant gained entry, the accomplice entered with a rifle, demanded the victim's

drugs, and got into a scuffle with him. The accomplice shot the victim, who fell to his knees. Defendant pushed him the rest of the way down, and the accomplice stood over the victim and shot him in the back, killing him. The two men then broke into the victim's bedroom, where they took money and drugs from the victim. Defendant later told police he did not know whether the victim was dead or alive. (*Ibid.*) The court found sufficient evidence supported a finding that defendant was a major participant because he planned the robbery and was instrumental in enabling his accomplice to enter the victim's home with a rifle. (*Id.* at p. 617.) Further, the court found defendant evidenced reckless indifference to life in his failure to assist the victim and in the fact the robbery was planned as a home invasion with a rifle, circumstances carrying an extreme likelihood death could result. (*Ibid.*)

Here, sufficient evidence supports a finding that defendant acted with reckless indifference and was a major participant in the Hanmi Bank robbery. Defendant knew there was an armed security guard at the bank; he had spoken to him the day before. The evidence supports an inference that part of the robbers' plan was to immediately subdue the security guard upon entry into the bank and take the guard's weapon while defendant took funds from the teller. Once that was accomplished, it became extremely likely that death could result because the two bank robbers were in possession of a weapon under stressful circumstances. Once the guard was shot, neither defendant nor the other two robbers made any attempt to come to his aid or to ascertain the extent of his injuries. Furthermore, any contention that the evidence does not support a finding that defendant was a major participant is belied by facts showing his participation in the planning of the robbery by casing the scene the day before and his instrumental role in taking money from the cash drawer of the teller.

IV. THE TRIAL COURT'S JURY NULLIFICATION ADMONITIONS DID NOT VIOLATE THE CALIFORNIA SUPREME COURT'S HOLDING IN *PEOPLE v. ENGELMAN*.

Defendant contends that the trial court erred in advising the jury to inform the court if a juror refused to deliberate, and by obtaining an affirmation from each juror that they would

abide by this obligation.[7] Thus, although the trial court did not give the jury CALJIC No. 17.41.1,[8] which was expressly disapproved by *People v. Engelman* (2002) 28 Cal.4th 436, defendant argues the trial court's conduct violated the spirit of *Engelman* and was an attempt to circumvent the Supreme Court's holding. Furthermore, he contends that because it cannot be established beyond a reasonable doubt that the trial court's instructions did not contribute to the guilty verdict, reversal is required.

In *Engelman,* the Supreme Court held that CALJIC No. 17.41.1 should not be given in future criminal trials, but that its use does not infringe upon a defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict, and does not require reversal of a defendant's conviction. (*People v. Engelman, supra,* 28 Cal.4th 436 at p. 440.) Although it rejected constitutional arguments that the instruction was defective, *Engelman* acknowledged that "criticism of the instruction is warranted. There is risk that the instruction will be misunderstood or that it will be used by one juror as a tool for browbeating other jurors. The instruction is given immediately before the jury withdraws to commence its deliberations and . . . focuses on the process of deliberation itself. We believe it is inadvisable and unnecessary for a trial court to create the risk of intrusion upon the secrecy

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[7] The court advised the jury: "I need 12 jurors to deliberate. If you are unable to get that 12th juror to talk about the case and exchange what may be the best views about the evidence and the law with the other jurors, but it won't benefit you if you don't hear it, you are unable to get that juror to talk about the case, would you let me know by sending a note out through the bailiff to me that a juror is not deliberating so that I can encourage that juror to deliberate and thereby have 12 jurors talking about the case? [¶] Can you do that for me? This admonition was repeated throughout the trial.

[8] CALJIC No. 17.41.1 provided: "The integrity of a trial requires that all jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on [penalty or punishment, or] any [other] improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

of deliberations or of an adverse impact upon the course of deliberations by giving such an instruction." (*Id.* at p. 445.)

This dicta in *Engelman* guides our analysis. To the extent the trial court's admonitions in the instant case tracked the language of CALJIC No. 17.41.1, they should not have been given; however, they did not violate defendant's constitutional rights. Furthermore, we find no prejudice because there is no evidence that the risks contemplated by *Engelman's* dicta actually materialized. The jury in the instant case deliberated without incident.

V. THE JUDGMENT IS TO BE CORRECTED TO STRIKE CUSTODY CREDITS.

Respondent contends that the trial court improperly awarded 1,464 days of custody credit to defendant,[9] to which defendant was not entitled because presentence custody stemming from multiple, unrelated incidents of misconduct may not be credited toward a subsequent prison commitment. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1193-1194 (*Bruner*).) Defendant contends that respondent waived the issue by failing to raise it below and by failing to file a cross-appeal. On the merits, defendant contends that the narrow exception to the waiver doctrine does not apply in this instance because an improper award of presentence credits does not amount to an unauthorized sentence. (See *People v. Montalvo* (1982) 128 Cal.App.3d 57, 64.)

Although respondent did not appeal from the judgment, it may raise on appeal the question whether defendant's sentence was authorized by law. (§ 1238,[10] subd (10); *People v.*

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[9] At the hearing, the trial court calculated that defendant was entitled to 976 days of actual credit and 488 days of good time/work time credit. At the time of sentencing, the People informed the court that defendant was currently in prison serving a nine-year term for armed robbery, although at the time of his October 2000 arrest he had been released pending sentencing in the prior case. Defendant's commitment record from the Department of Corrections indicates defendant was incarcerated on another case from the time of his arrest on October 19, 2000. The prosecutor did not object to the award of presentence credits.

[10] Section 1238 provides in relevant part that: "(a) An appeal may be taken by the people from any of the following: [¶] . . . [¶] (10) The imposition of an unlawful sentence, whether or not the court suspends the execution of the sentence, except that portion of a sentence

Scott (1994) 9 Cal.4th 331, 354 [unauthorized sentence may be corrected at any time by appellate court].) As explained in *Scott,* "'the unauthorized sentence concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal. . . . [¶] . . . a sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case. . . . [L]egal error resulting in an unauthorized sentence commonly occurs where the court violates mandatory provisions governing the length of confinement." (*Id.* at p. 354.) This rule applies to incorrect awards of presentence custody credits, which may be corrected for the first time on appeal. (*People v. Fitzgerald* (1997) 59 Cal.App.4th 932, 936.)

With respect to defendant's entitlement to presentence custody credits, section 2900.5, subdivision (b) provides that presentence credits shall be given "only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted." In *In re Rojas* (1979) 23 Cal.3d 152, the Supreme Court held that one of the purposes of section 2900.5 is to ensure that a defendant held in pre-trial custody on the basis of unproven criminal charges does not serve a longer overall period of confinement upon a subsequent conviction. (*Id.* at p. 156.) This rule does not apply where the defendant's preconviction incarceration relates to another charge. Section 2900.5 does not authorize credit in this instance. (*Bruner, supra,* 9 Cal.4th 1178 at p. 1184.) Thus, to be entitled to custody credits, defendant must establish that he would not have been in custody but for the charges stemming from the instant proceeding. (*Bruner, supra,* 9 Cal.4th at p. 1194; *People v. Purvis* (1992) 11 Cal.App.4th 1193, 1196.)

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imposing a prison term which is based upon a court's choice that a term of imprisonment (A) be the upper, middle, or lower term, unless the term selected is not set forth in an applicable statute, or (B) be consecutive or concurrent to another term of imprisonment, unless an applicable statute requires that the term be consecutive. As used in this paragraph, 'unlawful sentence' means the imposition of a sentence not authorized by law or the imposition of a sentence based upon an unlawful order of the court which strikes or otherwise modifies the effect of an enhancement or prior conviction."

Here, the record demonstrates that defendant was incarcerated on another charge (robbery) for which he was serving a prison sentence. Defendant has therefore failed to establish that but for the current charges, he would have been free from custody. Therefore he is not entitled to presentence custody credits. (*Bruner, supra,* 9 Cal.4th at p. 1184.)

VI. DEFENDANT'S HABEAS PETITION IS DENIED.

Defendant contends that his counsel's failure to object to introduction of evidence that Owens had pled guilty to the Bank of American robbery and received a three-year prison sentence constituted ineffective assistance of counsel because defense counsel had no tactical reason for his failure to object to this highly prejudicial and irrelevant evidence. Defendant contends that an accomplice's guilty plea is inadmissible, and in this instance permitted the jury improperly to infer guilt by association with Owens. (See *People v. Leonard* (1983) 34 Cal.3d 183, 187-189.) Defendant argues that because this guilty plea was integral to the prosecution's case against defendant, counsel's failure to object fell below an objective standard of reasonableness. We disagree.

The right to effective assistance of counsel derives from the Sixth Amendment right to assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-674; see also Cal. Const., art. I, § 15.) To obtain a reversal of his conviction based upon ineffective assistance of counsel, appellant must show (1) counsel's conduct was deficient when measured against the standards of a reasonably competent attorney, and (2) prejudice resulting from counsel's performance "'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 784 [quoting *Strickland v. Washington*].) Prejudice is shown where there is a reasonable probability, but for counsel's errors, that the result of the proceeding would have been different. (*In re Harris* (1993) 5 Cal.4th 813, 832-833.) "[T]he petitioner must establish 'prejudice as a "demonstrable reality," not simply speculation as to the effect of the errors or omissions of counsel." (*In re Clark* (1993) 5 Cal.4th 750, 766 [internal citations and quotation marks omitted].) In a habeas proceeding, the defendant may present evidence outside of the trial record to establish a prima facie case for habeas relief; if a prima facie case

is made, we will issue an order to show cause. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 502.)

Our review of counsel's performance is deferential, and strategic choices made after a thorough investigation of the law and facts are "virtually unchallengeable." (*In re Cudjo* (1999) 20 Cal.4th 673, 692.) The defendant "can be expected to rely on counsel's independent evaluation of the charges, applicable law, and evidence, and of the risks and probable outcome of the trial." (*In re Alvernaz* (1992) 2 Cal.4th 924, 933.)

In *People v. Leonard* (1983) 34 Cal.3d 183, the defendant and another man robbed a couple at gunpoint of jewelry and cash. The couple's identifications of the two robbers differed from the robbers' actual physical characteristics, although both identified the same two men as the robbers. (*Id.* at pp. 186, 188.) The court admitted evidence of the co-robbers' guilty plea. (*Id.* at p. 187.) In finding the admission of the evidence prejudicial, the court noted that the circumstance that "some time after the robbery defendant was stopped and arrested with another man who then pleaded guilty to the commission of a robbery earlier in the evening invites an inference of guilt by association. . . ." (*Id.* at p. 188.) Furthermore, given the problems with the identification evidence, the court found that but for the introduction of the guilty plea, it was reasonably likely the jury would have acquitted the defendant. (*Id.* at p. 189.)

In the instant case, we do not find the same prejudice as in *Leonard.* Here, defendant and Owens were pulled over by the police; Owens later implicated defendant as his co-lookout in the robbery. This evidence is unequivocal. Therefore, even without admission of the guilty plea, it is not reasonably probable the jury would have acquitted defendant given the strength of Owens's implication evidence. Thus, whether or not counsel objected to the admission of guilty plea was of no tactical significance, and we find no ineffective assistance of counsel.

DISPOSITION

The judgment of the superior court is affirmed. The abstract of judgment is ordered corrected to strike the award of 1,464 days of presentence custody credit. The clerk of the Superior Court is ordered to send a copy of the corrected abstract of judgment to the Department of Corrections. Petition denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ZELON, J.

We concur:

PERLUSS, P. J.

JOHNSON, J.